Supreme Court, U.S.
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No. 92-1687

In The

Supreme Court of the United States

October Term, 1992

o

Patricia A. Gallegos,

Petitioner,

v.

The City and County of Denver; Federico Peña; William Roberts; David Miller; Kathy Archuleta; Allegra Haynes; Kevin Marchman; Larry Fullerton; John Mrozek; Ruth Rodriquez; Michael Musgrave; Randy Alexander; Ron Younger; and George Doughty,

Respondents,

and King Harris,

Defendant.

o

Respondents' Brief in Opposition to Petition for Writ of *Certiorari* to The United States Court of Appeals for The Tenth Circuit

o

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May 1993

Questions Presented for Review

1. Whether discharge and termination claims are actionable under 42 U.S.C. § 1981 after the decision of the Supreme Court in *Patterson v. McLean Credit Union.*

2. Whether the correct standards were applied regarding the affirmative defense of qualified immunity.

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The respondents respectfully request this Court to deny the petition for writ of *certiorari.*

CITATIONS FOR OPINIONS AND JUDGMENTS BELOW

The respondents are satisfied with the opinions of the courts below which are listed by the petitioner. However, not included is the date of the order issued in this case respecting rehearing as required by Rule 14 of the Rules of the Supreme Court. On February 17, 1993, the Tenth Circuit denied the petition for rehearing as untimely, and on March 1, 1993, a second motion to permit the filing of the petition for rehearing was denied.

STATEMENT OF THE CASE

Nature of the Case

In addition to the nature of the case submitted by the petitioner, the respondents provide the following supplementary information.

The respondents' motion to dismiss the first amended complaint raised the qualified immunity defense, among other claims. This claim was denied by the district court because "these defenses are necessarily related to facts not yet established at the pleading stage and cannot properly be decided on a motion to dismiss."

The respondents' motion for summary judgment reasserted the qualified immunity issue. During the summary judgment hearing, the court denied the qualified immunity defense, stating in part:

> COURT: ...I think when we start trying to sort out all those individual defendants, what I'll allow you to do is if they don't show any evidence which is sufficient to subject these individual defendants to liability, I'll entertain a motion for attorney's fees as to those individual defendants.
>
> I'm very concerned about--to use only as an example--the case against Randy Alexander. It appears

to me the only thing he ever did with respect to this plaintiff which had anything to do with her, with these claims, was make some comment with respect to her job performance. I can't remember exactly what it was, but it was a nondescript comment. As far--well, and perhaps I should say for purposes of this order, I did not address the issue of qualified immunity, because I think there are factual issues remaining there, so as to the qualified immunity issue, I know you addressed that in your motion. I'm denying the motion with respect to the qualified immunity...

COURT: ...As to the minor players, all they're going to suffer through is the inconvenience and mental problems of having to have their name on a lawsuit.

COURT: ...I'm leaving--I'm guess I'm erring in favor of the defendants--or the plaintiff's position that she be entitled to have an opportunity--have her day in court with regard to those 1981 claims. I don't know what theory he's got, where he says he can create a 1981 case on an expectation. I don't think there is any such theory, but I'm going to give him a chance to present it. If he doesn't find a theory between now and trial, I would suggest he'll probably scratch the 1981 case, but that's where we're going with this.

The Tenth Circuit Court of Appeals reversed this ruling upon appeal by the respondents.

Statement of the Facts

Patricia Gallegos was an appointee of former Mayor Federico Peña from January 5, 1987 until she was dismissed on April 11, 1988. She held a non-tenured political appointment. Originally her title was administrative assistant to the mayor, and on January 1, 1988, her title changed to deputy manager of

Public Works for Finance Administration. She was never a career service merit system employee.

The position of director of Affirmative Action, which the petitioner held, administered the city's minority business and women's business enterprise plans and compliance with Federal Aviation Administration regulations. The office implemented the provisions of Denver's ordinance setting aside contracts to qualifying minority and women-owned businesses. During the selection process in which Patricia Gallegos was hired, she was told how important it was for the director of Affirmative Action to work with the community. Shortly after Patricia Gallegos was hired, complaints were received about her ability to work with her staff, the community, and Hispanic, Black and other minority contractors. In September 1987, a meeting was held with Ms. Gallegos and the mayor's office at which time she was given ninety days to improve her performance and to respond to the community's complaints.

The petitioner claims that there was an agreement among the mayor, King Harris and Councilmember Bill Roberts to terminate her employment. According to the petitioner, she was told by Michael Heitzmann in April of 1987 that a deal had been struck between the mayor, Bill Roberts, King Harris and others which required the mayor to fire her in exchange for political support in the May 1987 mayoral election. The petitioner claims that she learned of this "agreement" when defendant Roberts stated to her, "we cut a deal, you're on your way out of here - the mayor promised us he is going to fire you." She also indicated that she learned of this from Ruth Rodriguez in January 1988.

Mayor Peña denied that he entered into any agreement with King Harris, Bill Roberts or anyone else to dismiss the petitioner from her position as the director of Affirmative Action. He acknowledged that each of those individuals complained about Ms. Gallegos' performance as did many other people in the administration and the community.

Bill Roberts also denies that there was any agreement with the mayor to terminate the petitioner from employment. He does note that he received numerous calls while a city councilman which were critical of her performance as director of Affirmative Action, from both Hispanic and Black contractors. Bill Roberts voiced his concerns about Patricia Gallegos to the mayor on a number of occasions. He wrote a letter to the mayor asking that Patricia Gallegos be removed because she was not administering her office in a reasonable and responsive manner. His letter references the crisis meetings with minority business people which had occurred because of Ms. Gallegos' administration of the office.

The purported sources of the "agreement" between the mayor and others to terminate Ms. Gallegos were Michael Heitzmann and Ruth Rodriguez. In Mr. Heitzmann's affidavit he states that he did inform Ms. Gallegos that there had been an agreement prior to Patricia Gallegos being hired, but it was to move Ron Younger from the Affirmative Action office to the Stapleton Airport office to be responsible for airport-related contract activity. As Ms. Gallegos' supervisor, Mr. Heitzmann instructed Ms. Gallegos to accomplish this staffing change, and she refused. Mr. Heitzmann indicated that he had no direct knowledge of any discussion between the mayor and Councilman Roberts or any agreement between the mayor or anyone else to dismiss Patricia Gallegos. In the affidavit of Ruth Rodriguez, she indicates there was no agreement with the mayor or others to terminate Ms. Gallegos in exchange for political support in the 1987 campaign. Ms. Rodriguez indicates she did not inform Ms. Gallegos of any such agreement since it did not exist.

Patricia Gallegos made the following allegations against the individual municipal respondents; and, in summary, each individual responded as stated below:

Randy Alexander

The petitioner claims that Mr. Alexander, a director in the Public Works Department, never invited her to his division staff meetings. The petitioner alleges that Mr. Alexander came to her office and told her that she was "acting petty" concerning her refusal to prequalify a minority contractor named Ulibarri. She also alleges that Randy Alexander advised her that she could spend $5,000 on furniture, but she decided to buy used furniture and only spent $100.

Randy Alexander asserts he repeatedly invited Patricia Gallegos to meetings and she chose not to attend. He denies any criticism of her refusal to prequalify a contractor. Mr. Alexander had no authority to hire or fire the petitioner.

Katherine Archuleta

The petitioner alleged that defendant Archuleta, who was then an assistant to the mayor, told her that she would "have to suffer the consequences" if she did not give a "strong" performance rating to defendant Younger. Ms. Archuleta denied this allegation.

George Doughty

The petitioner contended that airport director George Doughty gave her specific instructions that she should not be in attendance at a meeting with Bill Roberts. She also alleges that Mr. Doughty told her that Blacks were the only "real minorities".

In Mr. Doughty's affidavit, he explains that in an informal meeting with the Minority Contractors' Association, he remarked that in Cleveland where he had worked previously if you were not a Black in that political environment, you were not considered to be a minority. He denies telling Ms. Gallegos that she could not be in a meeting where Bill Roberts was present. Mr. Doughty had no authority to hire or fire the plaintiff.

Lawrence Fullerton

The plaintiff alleges that Lawrence (Larry) Fullerton, Deputy Manager of Public Works, did not invite her to a meeting regarding the Colorado Convention Center but instead invited one of her subordinates. The plaintiff attended this meeting anyway at which time she alleges that Mr. Fullerton made a remark which she interpreted as racially insulting. Mr. Fullerton apologized to Ms. Gallegos for his remark after learning she was insulted by it. He received a three day suspension from the Manager of Public Works for his remarks. Mr. Fullerton had no authority to hire or fire the plaintiff.

Allegra Haynes

Ms. Gallegos alleged that Allegra (Happy) Haynes, then an administrative assistant to the mayor, gave orders to her staff to certify certain minority contractors and carry out other demands. Allegedly, Ms. Haynes told Ms. Gallegos shortly after she was employed that she should not have been hired in the first place, and she should be responsive to various members of the community.

Ms. Haynes, who is presently a Denver City Councilwoman, took an interest in the Affirmative Action office because she had worked to create it and wanted to see that the original intent of the ordinance was carried out. Ms. Haynes had no authority to hire or fire the plaintiff.

Kevin Marchman

The petitioner contends that Kevin Marchman, then deputy chief of staff to the mayor and now the executive director of the Denver Housing Authority, demanded that she certify King Harris' firm as a minority contractor even though he failed to supply necessary income tax information. She indicates that Mr. Marchman contacted an airport official to obtain an extension of time for Harris to rectify a certification problem. She also alleges that Mr. Marchman stated to her in late 1987 that

he did not have to worry about her in the future because she would not be around much longer.

Mr. Marchman states that one of his first tasks when employed with the city in October 1987 was to meet with the representatives of the Black community. At that meeting he was advised that because of problems in the Affirmative Action Office, people in the Black community wanted Patricia Gallegos removed from the director's position. That problem continued.

Mr. Marchman said that after he had been with the city for a matter of weeks, he received a call from King Harris about problems in receiving his certification. Mr. Marchman did place a call to an airport official to see if the problem could be resolved. He never dealt directly with the contractor with whom Mr. Harris was having difficulties. He had no authority to hire or fire the petitioner.

David Miller

David Miller began working as Mayor Peña's chief of staff in August 1987. In September 1987, a meeting was held with Mr. Miller, Patricia Gallegos and the mayor regarding the concerns expressed by Councilman Bill Roberts in an August letter. Ms. Gallegos acknowledges the meeting, but denies that the parties who had made complaints against her were identified. Ms. Gallegos indicates that in December 1987 David Miller promised her a "career service position which would be requisitioned by my supervisor and submitted to the Career Service Authority for approval." Ms. Gallegos alleges that she met with David Miller on April 11, 1988 and was informed that if she did not resign from her position she would be fired and "they would make my life miserable."

Mr. Miller states that in September 1987 Ms. Gallegos was given a ninety day evaluation period to rectify the problems raised by Councilman Roberts and others concerning her public relations problems. In October 1987, Mr. Miller represented the mayor at the meeting of the Colorado Black Woman's Political

Caucus at which approximately two hundred people were in attendance. After a speaker gave a lengthy criticism of Patricia Gallegos and her relationship with the Black community, there was a standing ovation in the room. In December 1987, Mr. Miller was not satisfied that Ms. Gallegos had taken the initiative to meet with the public and address their concerns. After having received calls from members of the Hispanic community urging the mayor to remove Ms. Gallegos, he recommended to Mayor Peña that Ms. Gallegos be dismissed because she "had become a major liability to the administration and had shown no aptitude for addressing the problems" which had been described to her. Mr. Miller indicates that rather than dismissing Ms. Gallegos, the mayor reassigned her to a different political appointee position in the Department of Public Works. A discussion was held about attempting to move Ms. Gallegos into a career service position, and Ruth Rodriguez was to attempt that change.

In January, February and March 1988, David Miller received three or four communications from Michael Gallegos, a lawyer representing her sister Patricia Gallegos. These conversations related minor and petty problems Patricia Gallegos was having. On April 6, 1988, Michael Gallegos informed Mr. Miller that she would "go to the press" on April 8 if she did not receive a promise by noon on April 7 that Patricia Gallegos would be employed for one year, given a career service position, and receive a waiver of the probationary period or a retroactive career service employment date. This call was received one week before the filing deadline for recall petitions that were then circulating concerning the mayor, leading Mr. Miller to believe they were trying to take advantage of the administration's desire to avoid additional bad press. On April 11, 1988, Patricia Gallegos was informed by David Miller and Ruth Rodriguez that she must either resign or be fired. Mr. Miller denied that he ever told the petitioner that he would "make her life miserable" if she did not resign.

John Mrozek

Ms. Gallegos alleges that John Mrozek, former Manager of Public Works, accused her on April 7, 1988 of authorizing her sister to tell David Miller that she would go to the press if certain employment promises were not honored. John Mrozek verifies that he told the petitioner he would not be blackmailed, and she was free to make a statement to the press if she wished.

Michael Musgrave

Patricia Gallegos alleges that Mike Musgrave, then a deputy manager for the Department of Public Works, ordered her to give Ron Younger a "good" performance evaluation, and when she refused to do so, he told her that she would "suffer the consequences". She alleges that Mr. Musgrave intentionally excluded her from meetings and unfairly criticized her after she was reassigned to the position of Director of Contract Administration.

Mr. Musgrave relates in his affidavit that he had a meeting with Ms. Gallegos about how to deal with people because of severe morale problems in her office. Ms. Gallegos, according to Mr. Musgrave, got very emotional in these meetings and yelled loudly. Mr. Musgrave indicates that he never told Ms. Gallegos she would have to suffer the consequences for not giving Mr. Younger a good rating. Mr. Younger received a good rating because Career Service Authority rules required a good rating when an evaluation was filed late. Mr. Musgrave indicates he notified Ms. Gallegos of every meeting at which her presence was necessary.

Federico Peña

The petitioner complains that she was removed from the Office of Affirmative Action in December 1987 without an opportunity to remedy her deficiencies and without feedback on how to measure her performance. However, as an at-will employee, the petitioner could be terminated without cause. The petitioner alleges that there was a deal between Mayor Peña,

Bill Roberts, King Harris and others for the mayor to dismiss her from her employment in exchange for political support in the May 1987 mayoral election.

Mayor Peña totally rejects that accusation, noting that although Harris, Roberts and many others complained about Ms. Gallegos' performance, he ultimately dismissed her after her sister conveyed a threat to go to the press if Ms. Gallegos did not receive an immediate Career Service Authority position. Granting the petitioner an immediate tenured career service position would have violated Career Service Authority Rules and Denver's Charter. The mayor dismissed Ms. Gallegos for her performance problems and for making threats.

William (Bill) Roberts

The petitioner claims that there was an agreement among the mayor, King Harris and Bill Roberts to terminate her employment. The petitioner claims defendant Roberts stated to her that "we cut a deal, you're on your way out of here--the mayor promised us he is going to fire you."

Bill Roberts denies that there was any agreement with the mayor to terminate the petitioner from employment. Bill Roberts wrote a letter to the mayor asking that Patricia Gallegos be removed because she was not administering her office in a reasonable and responsive manner.

Ruth Rodriguez

The petitioner alleges that Ruth Rodriguez, then Deputy Manager of Public Works, dismissed her upon instructions from Mayor Peña. The petitioner alleges that Ruth Rodriguez harassed and unduly criticized her. She claims that Ruth Rodriguez failed to disclose meetings to her, refused to allow her to attend meetings, gave her short notice about meetings, and refused to give her sufficient staff or resources. She claims Rodriguez was overly critical of her refusal to pre-qualify a minority contractor. Ms. Gallegos says that Ruth Rodriguez would not return her phone calls. She complains that Ruth Rodriguez never initiated

the necessary paperwork to create a career service position for her.

Ms. Rodriguez responds that at the September 1987 meeting with Ms. Gallegos, it was explained to the petitioner that complaints were being received about her from the community and that she had ninety days to improve her performance. Ms. Rodriguez states that in 1988, because of a budget crunch, Ms. Rodriguez' own position as well as that of Allegra Haynes and Patricia Gallegos were earmarked in the budget as potential alternative positions to be cut in the event of drastic budget cuts. After Ms. Gallegos learned of this budget situation, she began a confrontational battle and threatened to go to the media.

Ms. Rodriguez indicated that she invited Ms. Gallegos to every meeting at which her presence was necessary, and that the petitioner received as much notice as possible for every meeting. Ms. Rodriguez notes that after Ms. Gallegos was transferred from Affirmative Action, she was so upset and angry about the situation that she let it affect her performance. Although arrangements were made for her to get a new office and furniture, Ms. Gallegos was never satisfied with anything concerning the move. Ms. Rodriguez states that there was a discussion about attempting to create a Career Service Authority position for the director of Contract Administration, but there was no guarantee that Ms. Gallegos would have the position. In the interim, when the budget department indicated that there needed to be large cuts in the Department of Public Works, there was no possibility of pursuing a career service position. No requisition for a position was ever filed nor did the petitioner apply for the position.

Ron Younger

The petitioner claims that Ron Younger, her subordinate in the Affirmative Action Office, was "extremely hostile and antagonistic" toward her. The petitioner complains that he failed to arrange for her furniture on her first day at work. She

alleges she found spoiled food in the filing cabinets. She asserts that he failed to carry out the assignments she gave him, and he would leave the office and fail to advise her of his whereabouts.

Mr. Younger states that Ms. Gallegos' attitude toward him was hostile from her first day on the job. Meetings were held with upper level management in an effort to work out the communication problems between Patricia Gallegos and Ron Younger. He indicates that Ms. Gallegos removed his furniture and dumped it on the floor of an adjacent office. Younger had no authority to hire or fire the petitioner, who was his supervisor.

SUMMARY OF THE ARGUMENT

The petition for certiorari should not be granted because the Tenth Circuit Court of Appeals properly found that the individual municipal respondents had qualified immunity, in accord with applicable decisions of this Court.

This Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), ruled that 42 U.S.C. § 1981 is restricted by its terms to preventing discrimination in the making and enforcement of contracts. Section 1981 does not extend to conduct by the employer after the contract relationship has been established, including breach of the contract's terms or imposition of discriminatory working conditions. Employment cases involving dismissal from employment are necessarily excluded from coverage under 42 U.S.C. § 1981.

The Tenth Circuit Court of Appeals also properly construed the decisions of this Court in determining that, as a matter of law, the individual respondents did not violate clearly established legal norms nor did the law clearly proscribe the actions the respondents took.

ARGUMENT I

THE DECISION OF THE SUPREME COURT IN *PATTERSON V. McLEAN CREDIT UNION* PRECLUDED CLAIMS FOR DISCHARGE FROM EMPLOYMENT UNDER 42 U.S.C. § 1981

Section 1981 is restricted by its terms to preventing discrimination in the making and enforcement of contracts. *Patterson v. McLean Credit Union,* 491 U.S. 164 (1989). It does not extend to conduct by the employer after the contract relationship has been established, including breach of the contract's terms or imposition of discriminatory working conditions. Section 1981 does not extend beyond conduct by an employer that impairs an employee's ability to enforce through the legal process his or her established contract right. *Patterson,* 491 U.S. at 177.

The petitioner urges the Court to apply the decision in *Hicks v. Brown Group,* 902 F.2d 630 (8th Cir. 1990), which she admits has been vacated and remanded *sub nom,* __ U.S. __, 112 S. Ct. 1255 (1992). On October 9, 1991, *Hicks v. Brown Group, Inc., supra,* was reversed by the Eighth Circuit Court of Appeals in light of its ruling in *Taggart v. Jefferson County Child Support Enforcement Unit,* 935 F.2d 947 (8th Cir. 1991) that discriminatory discharge claims are not actionable under 42 U.S.C. § 1981. 946 F.2d 1344 (8th Cir. 1991). The 1992 remand from this Court is to consider the case in light of the Civil Rights Act of 1991. 112 S. Ct. 1255 (1992).

Similarly, every appellate decision of the circuit courts of appeals which has reviewed this issue has determined that *Patterson, supra,* precludes such claims. See *Trujillo v. Grand Junction Regional Center,* 928 F.2d 973 (10th Cir. 1991); *Gonzalez v. Home Insurance Co.,* 909 F.2d 716 (2d Cir. 1990); *McKnight v. General Motors Corp,* 908 F.2d 104 (7th Cir. 1990), *cert.* denied, 11 S. Ct. 1306 (1991); *Courtney v. Canyon Television & Appliance Rental, Inc.,* 899 F.2d 845 (9th Cir. 1990); *Lavender v. V & B Transmissions & Auto Repair,* 897

F.2d 805 (5th Cir. 1990); *Williams v. First Union Nat'l Bank*, 920 F.2d 232 (4th Cir. 1990); *Prather v. Dayton Power & Light Co.*, 918 F.2d 1255 (6th Cir. 1990); *Patterson v. Intercoast Management of Hartford, Inc.*, 918 F.2d 12 (2d Cir. 1990); *Thompkins v. Dekalb County Hosp. Auth.*, 916 F.2d 600 (11th Cir. 1990).

The cases cited by the petitioner in the first argument of her petition for *certiorari* do not state the law on this issue. The petitioner cites a number of cases for the proposition that *Patterson v. McLean Credit Union, supra,* does not preclude actions involving discriminatory discharge or termination from employment. She cites *Booth v. Terminix International, Inc.*, 722 F. Supp. 675 (D. Kan. 1989) and *Birdwhistle v. Kansas Power and Light Company,* 723 F. Supp. 570 (D. Kan. 1989). Both of these decisions were made by the same Kansas district court judge. However, neither of these cases is good law within the Tenth Circuit, of which Kansas is a member, in light of the Tenth Circuit's ruling in *Trujillo v. Grand Junction Regional Center, supra,* two years after the *Booth* and *Birdwhistle* decisions. The case of *Jackson v. City of Albuquerque,* 890 F. 2d 225 (10th Cir. 1989), in which the petitioner refers to an ambiguous footnote, is also controlled by *Trujillo*. For the same reason, *Carroll v. Elliott Personnel Services,* 51 F.E.P. Cases 1173 (D. Md. 1989) is no longer the state of the law in the Fourth Circuit in light of *Williams v. First Union National Bank, supra,* decided in 1990. Another case cited by the petitioner, *Gamboa v. Washington,* 716 F. Supp. 353 (N.D. Ill. 1989), is no longer the law in the Seventh Circuit in light of *McKnight v. General Motors Corp., supra,* decided in 1990. The final case cited by the petitioner for this proposition, *Vance v. Southern Bell,* 863 F.2d 1503 (11th Cir. 1989), to which the petitioner again points to a footnote, has been overshadowed by the Eleventh Circuit decision in *Thompkins v. DeKalb County Hospital Authority,* supra, some two years later.

Two other cases cited by the petitioner in support of her argument are *Greggs v. Hillman Distributing Co.*, 719 F. Supp.

552 (S.D. Tex. 1989), and *Hall v. County of Cook*, 719 F. Supp. 721 (N.D. Ill. 1989). *Greggs* does not stand for the proposition for which it is cited by the petitioner. *Greggs v. Hillman Distributing Co., supra,* does not hold that *Patterson* "did not intend to change existing precedent allowing (termination) claims under § 1981." To the contrary, *Greggs* states that:

> Considering the Supreme Court's interpretation of the terms 'make' and 'enforce' in *Patterson,* however, this Court concludes, as a matter of law, that claims of racially motivated discharge without more are outside the scope of Section 1981.

719 F. Supp. at 554.

Nor does *Hall v. County of Cook,* supra, stand for the proposition for which it is cited in the petitioner's brief at page 15. Rather, *Hall v. County of Cook, supra,* holds that "plaintiff's discharge from employment is beyond the scope of Section 1981 as construed in *Patterson.*" 719 F. Supp. at 724. Thus, these cases are consistent with their circuits' decisions: *Lavender v. V & B Transmissions and Auto Repair, supra;* and *McKnight v. General Motors Corp., supra.*

The petitioner makes a separate argument that discharge claims are actionable under 42 U.S.C. § 1981 as actions to "enforce a contract." This argument was plainly rejected by this Court in *Patterson.* In *Patterson,* the Court stated:

> Nor is it correct to say that racial harassment amounting to a breach of contract impairs an employee's right to enforce his contract. To the contrary, conduct amounting to a breach of contract under state law is precisely what the language of § 1981 does not cover. That is because, in such a case, provided that plaintiff's access to state court or any other dispute resolution process has not been impaired by either the State or a private actor, (cite omitted), the plaintiff is free to enforce the terms of the contract in state court, and cannot

> possibly assert, by reason of the breach alone, that he has been deprived of the same right to enforce contracts as enjoyed by white citizens.

491 U.S. at 183.

The petitioner also argues in her second argument that discharges motivated by racial animus remain actionable under 42 U.S.C. § 1981. In the cases where the circuit courts of appeals have held that discharges were not actionable, cited *infra,* the courts did not distinguish their decisions on the motivation underlying the dismissal. For example, in *McKnight v. General Motors Corp., supra,* where the discharge of the plaintiff was alleged to be based upon race and in retaliation for having filed claims of racial discrimination, the court barred this claim from being raised under 42 U.S.C. § 1981, regardless of motivation. Similarly in *Courtney v. Canyon Television & Appliance Rental, Inc., supra,* the plaintiff alleged that his termination was the result of racial discrimination. Again the court found this claim could not be raised under 42 U.S.C. § 1981. Since § 1981 only protects discrimination based on race, the rulings of all of the circuit courts of appeals that dismissals may not be challenged under this statute necessarily encompasses discharges motivated by race. Again the district court cases cited by the petitioner have been superseded by the later circuit court of appeals' rulings precluding termination actions discussed above. The one circuit court of appeals' decision cited by the petitioner, *Rathjen v. Litchfield,* 878 F.2d 836, 841 (5th Cir. 1989) does not hold that discharges motivated by racial animus remain actionable under § 1981. To the contrary, *Rathjen v. Litchfield, supra,* which addresses freedom of speech claims, questions whether § 1981 claims for retaliation survive *Patterson,* and simply finds it inapposite.

ARGUMENT II

THE PROPER STANDARDS REGARDING QUALIFIED IMMUNITY WERE APPLIED ON APPEAL

The district court denied the motion to dismiss filed by the respondents concerning qualified immunity claiming its resolution was based on facts not yet established at the pleading stage. The respondents then requested summary judgment on those claims which was also denied by the district court. The court chose not to address those defenses until trial even though the court was skeptical that the petitioner had stated a cause of action against many of the respondents.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), two presidential aides were alleged to have participated in a conspiracy to violate the constitutional and statutory rights of the plaintiff in recommending his dismissal from employment. The Court discussed the immunity to which government officials are entitled against suits for damages, and emphasized the need for early resolution of this immunity:

> Insubstantial lawsuits can be quickly terminated by federal courts alert to the possibilities of artful pleading. Unless the complaint states a compensable claim for relief ..., it should not survive a motion to dismiss. Moreover, the Court recognized in *Scheuer* the damages suits concerning constitutional violations need not proceed to trial, but can be terminated on a properly supported motion for summary judgment based on the defense of immunity ....
>
> In responding to such a motion, plaintiffs may not play dog in the manger; and firm application of the Federal Rules of Civil Procedure will ensure that federal officials are not harassed by frivolous lawsuits.

Harlow, 457 U.S. at 808, citing *Butz v. Economou*, 438 U.S. 478, 507-508 (1978).

The Court found there was no distinction between suits brought against state officials under 42 U.S.C. § 1983 and suits brought directly under the Constitution against federal officials. *Harlow*, 457 U.S. at 809.

The Court recognized the claim should be dismissed early in the process to avoid the societal costs

> of the expenses of litigation, the diversion of official energy from pressing public issues and the deterrence of able citizens from acceptance of public office, (and)... the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible (public officials), in the unflinching discharge of their duties.'

Harlow, 457 U.S. at 814.

The Court held that "bare allegations of malice" should not result in either a trial or discovery, and that officials

> performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow, 457 U.S. at 818.

The Court set the standard for review on summary judgment and indicated that a court may determine not only the currently applicable law, but whether the law was clearly established at the time an action occurred. Until the immunity issue is resolved, no discovery should be allowed. *Ibid.*

In *Mitchell v. Forsyth*, 472 U.S. 511 (1985), the Supreme Court discussed the standards for an appellate court reviewing the denial of the defendants' claim of qualified immunity. The Court determined that the appellate court

> need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. All it need determine is a question of law: whether the legal norms allegedly violated by the defendant were clearly established at the time of the challenged actions or, in cases where the district court has denied summary judgment for the defendant on the ground that even under the defendant's version of the facts the defendant's conduct violated clearly established law, whether the law clearly proscribed the actions the defendant claims he took.

Mitchell, 472 U.S. at 528.

More recently, in *Siegert v. Gilley*, 500 U.S. __, 111 S. Ct. 1789 (1991), the Supreme Court again analyzed the proper framework for determining whether a plaintiff's allegations are sufficient to overcome a defense of qualified immunity as asserted in a motion for summary judgment. *Siegert*, 111 S.Ct. at 1793. Plaintiff Siegert was a clinical psychologist who had been terminated from a federal government facility. After his forced resignation from the hospital, his former supervisor sent a letter in response to a credential check describing Dr. Siegert as inept and unethical. Dr. Siegert filed a *Bivens* claim against this supervisor alleging infringement of his liberty interest in violation of the due process clause of the Fifth Amendment. When the supervisor filed a motion to dismiss under qualified immunity contending that Siegert's allegations did not state the violation of any clearly established constitutional right, the district court declined to decide the summary judgment motion until further discovery was allowed. Citing *Harlow*, the Supreme Court found error in allowing the case to go forward without having performed the necessary analysis of the qualified immunity claim.

> A necessary concomitant to the determination of whether the constitutional right asserted by a plaintiff is "clearly established" at the time the defendant acted is the determination of whether the plaintiff has asserted a violation of a constitutional right at all.

Siegert, 111 S.Ct. at 1793.

The Court found that Siegert's claim of injury to his reputation was not a liberty interest protected under the Fourteenth Amendment. *Siegert*, 111 S.Ct. at 1794. Qualified immunity barred the claim because there was no clearly established federal statutory or constitutional protection. The plaintiff did not meet his burden to overcome the defense of qualified immunity asserted by the defendants.

Whether the action of a government official violates clearly established statutory or constitutional rights generally turns on the "objective legal reasonableness" of the action. *Anderson v. Creighton*, 483 U.S. 635 (1987). Whether that right was clearly established "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right... It is to say that in the light of pre-existing law the unlawfulness must be apparent." 483 U.S. at 640. The application of the protection requires cautious fact-specific analysis. Justice Scalia wrote for the Court:

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal" rule is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory provision. But if the test of "clearly established

> law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights. *Harlow* would be transformed from a guarantee of immunity into a rule of pleading.

Anderson, 483 U.S. at 639.

"As the qualified immunity defense has evolved, it provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). If officers of reasonable competence could disagree on this issue, immunity should be recognized. *Malley, supra.* Contrary to the district court's inclination in the case at issue to give the petitioner an opportunity to come up with a theory by trial, the Supreme Court requires that the petitioner have that theory, and her facts, on hand and scrutinized as to each individual respondent at the time of the summary judgment ruling on qualified immunity.

The Tenth Circuit Court of Appeals has frequently reviewed summary judgment decisions involving a qualified immunity defense. In those decisions, that court has recognized that "once a defendant raises a qualified immunity defense, the plaintiff bears a heavy burden." *Hannula v. City of Lakewood,* 907 F.2d 129, 130 (10th Cir. 1990). In *Hannula,* the court stated:

> ... (o)nce a defendant raises a qualified immunity defense the plaintiff assumes the burden of showing that the defendant has violated clearly established law. To overcome the defense, the plaintiff must do more than identify a clearly established legal test and then allege that the defendant has violated it. See *Pueblo Neighborhood,* 847 F.2d at 645. The plaintiff must demonstrate a substantial

> correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited.
> ... If the plaintiff fails to meet the burden of showing how a defendant violated a clearly established right, we must prevent the plaintiff from subjecting government officials to trial: (quotation omitted).
> If the plaintiff fulfills the burden of showing how the defendant violated a clearly established right, the defendant then bears the normal burden of a movant for summary judgment of demonstrating that no material facts remain in dispute.

Hannula, 907 F.2d at 131.

The plaintiff thus bears the burden of proving that the law was clearly established. *Pueblo Neighborhood Health Centers v. Losavio,* 847 F.2d 642, 645 (10th Cir. 1988). The trial court has an obligation in resolving the motion for summary judgment in which qualified immunity has been raised to "identify the law upon which it relied and state the basis for its conclusion on whether or not the defendant's alleged conduct violates the law and that the law was clearly established when the alleged violation occurred." *Pueblo Neighborhood, supra,* at 646. In this case, the trial court completely abdicated its responsibility to identify the clearly established law and to show how each of the defendants' conduct violated that law.

With respect to the petitioner's claims under 42 U.S.C. § 1981, the trial court properly ruled that the petitioner is limited to showing whether the respondents' actions prevented her from obtaining a new career service position. Thus, no clearly established law was violated in Ms. Gallegos' dismissal.

The petitioner also claims her dismissal violates 42 U.S.C. § 1981 because the mayor received comments from a member of city council and from citizens concerning her poor performance and acted upon it. Yet for an employee terminable at will, political input by the mayor's constituency regarding

her employment is not a contractual violation. In *Baden v. Koch,* 799 F.2d 825 (2nd Cir. 1986), a case concerning the dismissal of a chief medical examiner who was an appointee of the mayor, the Second Circuit found that the medical examiner had no property right in continued employment and could not challenge the critical statements made about him by various people. The court weighed the mayoral appointee's interest against the government interest:

> New York City's interest is in the ability of its executive officer to respond promptly and effectively to complaints about a high level official who is serving at the executive's discretion. Preserving that ability is plainly important to the functioning of government. The creation of such discretionary posts by the legislature is a recognition that quick adjustments among top personnel may sometimes be necessary for the executive branch to continue to do its job. Indeed, in giving the executive the power to make such personnel changes, the legislature also imposes a duty to do so. An executive who fails to act when the facts demand action will often be taken to task by the legislature, the media and the public for the continued shortcomings of his subordinates. In deciding what procedures are constitutionally required when such adjustments are made, therefore, we must not unnecessarily hinder municipal executives in their ability to make these important personnel decisions.

799 F.2d at 831-832.

Ms. Gallegos again failed to meet her obligation to show the clearly established constitutional right which was violated by the respondents with respect to her "conspiracy" allegation.

The petitioner appears to argue, too, that § 1981 protects her "rights to equal employment opportunity," but this premise too has been disclaimed by the Supreme Court in *Patterson.*

Allegations of racial harassment under Title VII are not synonymous with a § 1981 claim.

> The plaintiff's ability to plead that the racial harassment "is severe or pervasive" should not allow him to bootstrap a challenge to *conditions of employment (actionable, if at all, under Title VII) into a claim under § 1981,* that the employer refused to offer the petitioner the 'same right to ...make' a contract. We think it clear that the conduct challenged by petitioner relates not to her employer's refusal to enter into a contract with her, but rather to the conditions of her employment (emphasis added).

491 U.S. at 184-185.

Complaints about her furniture, her invitation to meetings, her treatment on the job all are claims at best described as racial harassment which clearly is precluded under § 1981.

The petitioner's claims against each of the individual respondents concern actions in the nature of racial harassment or a breach of contract. Since those claims are not cognizable under § 1981, it also follows that the individual respondents did not violate any clearly established statutory rights of the petitioner under § 1981.

The petitioner has failed to meet her burden under *Hannula, supra,* to show that the respondents have violated clearly established law by demonstrating a substantial correspondence between the conduct in question and prior law establishing that the respondents' actions were clearly prohibited.

The petitioner also claimed she was entitled to a job as a tenured merit system employee, which required a distinct recruitment process dictated by municipal administrative regulations. In *Patterson, supra,* the Supreme Court noted that a refusal to enter into a new contract is actionable under § 1981. This Court indicated that the petitioner in *Patterson* bore the

burden of proving a *prima facie* case of discrimination by proving

> by a preponderance of the evidence that she applied for and was qualified for an available position, that she was rejected, and that after she was rejected respondent either continued to seek applicants for the position, or, as is alleged here, filled the position with a white employee. (Cite omitted.)[7]
>
> [7]. Here, respondent argues that petitioner cannot make out a *prima facie* case on her promotion claim because she did not prove either that respondent was seeking applicants for the intermediate accounting clerk position or that the white employee named to fill that position in fact received a 'promotion' from her prior job. Although we express no opinion of the merits of these claims, we do emphasize that in order to prove that she was denied the same right to make and enforce contracts as white citizens, petitioner must show, *inter alia,* that she was in fact denied an *available* position. (Emphasis in the original.)

Patterson, 105 L.Ed.2d at 157.

Denver's Charter is clear that the plaintiff's status was that of an employee at will:

> The mayor shall appoint the heads of all administrative departments, and shall appoint all commissions, boards and officers, under his control; and said appointees shall hold said appointments so long as their services are satisfactory to the mayor.

Denver Charter § C5.20

An employee who is hired in Colorado for an indefinite period of time is an "at-will employee" whose employment may be terminated by either party without cause and without notice,

and whose termination does not give rise to a cause of action. *Continental Airlines, Inc. v. Keenan,* 731 P.2d 708, 711 (Colo. 1987).

Since the petitioner was an at-will employee, she had no contract of employment with the City and County of Denver. The petitioner claims she had been promised a career service merit system position. She did not apply for such a job, and all career service employees serve a probationary period prior to obtaining tenure in a position. *Hunter v. Manager of Safety of City and County of Denver,* 657 P.2d 456 (Colo. App. 1982). The petitioner admitted that the creation of a career service position for her would include a standard career service probation period. She also understood that the creation of a position was subject to the approval of the Career Service Authority.

"Employment with ...Denver... is governed by the provisions of the Denver City Charter." *Spickard v. Civil Service Commission,* 31 Colo. App. 450, 505 P.2d 32 (1972). The plaintiff's claim to a career service position is premised on an alleged agreement with the mayor to put her in a career service job. Assuming, *arguendo,* that this alleged agreement existed, it was illegal. The creation of a career service position cannot be accomplished without following the appropriate regulatory procedures. The record established that in order to create a career service position, it must be approved by the Career Service Authority. A requisition has to be submitted, after which analysts determine the appropriate classification and salary. After a position is created and approved, the position is announced publicly and applications are accepted. The Career Service Authority determines whether the applicants meet the qualifications. An examination is held for the position. After the examination, the top five candidates are sent to the appointing authority for interview. Under Denver's Charter, a non-career service employee cannot be placed in a career service position without submission of an application or going through a competitive examination procedure.

The plaintiff cannot ignore the legal limitations which bind public officials. *Keeling v. City of Grand Junction,* 689 P.2d 679 (Colo. App. 1984); *Driggins v. City of Oklahoma City,* 954 F.2d 1511, 1515 (10th Cir. 1992), *cert.* denied, 113 S. Ct. 129 (1992). One who contracts with a municipality is charged with knowledge of its limitations and restrictions in making contracts. The existing law at the time and place of the making of the contract, including the city charter, becomes a part of the contract. *Keeling, supra.* The petitioner had actual knowledge of the limitations of the career service system. The alleged agreement between the plaintiff and the mayor was "one positively condemned by law." *Berkeley Metropolitan District v. Poland,* 705 P.2d 1004, 1008 (Colo. App. 1985). See also *Meyer v. Buffalo Park Development Co.,* 44 Colo. App. 52, 607 P.2d 401 (1980); *Normandy Estates Metropolitan Recreation District v. Normandy Estates, Ltd.,* 191 Colo. 292, 553 P.2d 386 (1976). Patricia Gallegos did not apply for a Career Service Authority position, nor was she rejected. There was no available Career Service position because it was never created. The city never continued to seek applicants for a position; it never sought applicants for any such job. No position was filled. No requisition for the position was submitted. No classification was created. The position was never advertised. No one ever applied for the position. No examination was held to screen the applicants. No candidates were interviewed for the position. The plaintiff simply cannot show the existence of a *prima facie* case for a claim for failure to hire or promote under 42 U.S.C § 1981.

A claim seeking personal liability under § 1981 also must be predicated on the actor's personal involvement. *Allen v. Denver Public School Board,* 928 F.2d 978, 983 (10th Cir. 1991). The petitioner has the burden of proof to causally connect the actor with the discriminatory action. *Allen, supra.* There is no evidence in the record that respondents Younger, Fullerton, Marchman, Alexander, Haynes, Archuleta, Musgrave or Doughty had any personal involvement in the decision to terminate the plaintiff or to fail to create a new position. There

is no viable § 1981 claim against these respondents which can withstand a defense of qualified immunity. If the petitioner premises her § 1981 claim on her termination or on failure to create a new job, only the mayor had the authority to remove her from any exempt position. Denver Charter § C5.20. Only the manager of public works has the authority to appoint her to a career service position within the Department of Public Works. Denver Charter § A2.2. None of the other city respondents possess this authority. The petitioner failed to meet her burden of proof of coming forward with specific factual allegations supporting her contention that the respondents' actions were guided by impermissible motives. *Coen v. Runner,* 854 F.2d 374, 378 (10th Cir. 1988).

CONCLUSION

The petitioner did not meet her burden of proof to show that the law clearly established a constitutional right to her position with the city nor did she show a violation of any constitutional right at all.

Under *Patterson v. McLean Credit Union,* her 42 U.S.C. § 1981 claim based upon dismissal from employment fails to state a cause of action. The individual respondents are entitled to qualified immunity on the petitioner's claim under 42 U.S.C. § 1981 that a merit system position should have been created for her since she cannot show that any such position ever existed. A promise to create such a position is merely a future expectation, and unenforceable under Denver's Charter. There was no showing that the conduct of the government officials violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald, supra.* The ruling of the Tenth Circuit Court of Appeals does not conflict with any decision of another court of appeals and is in accord with decisions of this Court. The respondents respectfully request that the petition for writ of *certiorari* be denied.

Respectfully submitted,

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